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Supreme Court, U.S.
FILED

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No. _____

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IN THE
Supreme Court of the United States

EARL OLD PERSON, CAROL JUNEAU,
JOE MACDONALD, AND JEANNINE PADILLA,

Petitioners,

vs.

BOB BROWN, SECRETARY OF STATE FOR THE
STATE OF MONTANA; AND JUDY MARTZ,
GOVERNOR FOR THE STATE OF MONTANA,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Court should vacate this case on the grounds of mootness and remand with a direction to dismiss because the 1993 legislative redistricting plan challenged in the complaint has been superseded by a new redistricting plan based upon the intervening 2000 census.

2. Whether the decision of the court of appeals conflicts with the decisions of this Court and those of other United States courts of appeals by failing to give the required weight to proof of the factors identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the legislative history as most probative of a violation of Section 2 of the Voting Rights Act.

3. Whether the decision of the court of appeals conflicts with the decisions of this Court and those of other United States courts of appeals by placing primary reliance upon the election of a minority candidate after the commencement of the litigation who had no major party opposition.

4. Whether the decision of the court of appeals conflicts with the decisions of this Court and those of other United States courts of appeals because of its failure to consider all the relevant evidence of minority vote dilution.

5. Whether the lower court erred in finding that the challenged redistricting plan was not adopted with a discriminatory purpose.

Corporate Disclosure Statement

This petition is filed on behalf of individuals. Counsel is provided by the American Civil Liberties Union. The ACLU is a corporation, but has no parent corporation and issues no stock, public or private.

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IN THE

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EARL OLD PERSON, CAROL JUNEAU, JOE MACDONALD, AND JEANNINE PADILLA,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Earl Old Person, *et al.*, respectfully petition for a writ of certiorari to vacate and dismiss as moot, or in the alternative to review, the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a - 26a) is reported at 312 F.3d 1036. The opinion of the district court (App., *infra*, 27a- 56a) is reported at 182 F.Supp.2d 1002. The first opinion of the court of appeals (App., *infra*, 57a-85a) is reported at 230 F.3d 1113. The first opinion of the district court (App., *infra*, 86a-147a) is unreported. The opinion of the court of appeals denying a petition for rehearing and rehearing *en banc* (App., *infra*, 148a) is unreported.

JURISDICTION

The court of appeals entered its opinion affirming the decision of the district court on December 4, 2002, and entered an order denying a petition for rehearing and rehearing en banc on April 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 2201, suit being authorized by 42 U.S.C. § 1973j(f) and 1983.

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (App., *infra*, 149a).

STATEMENT

Petitioners are tribal members and residents of the Blackfeet and Flathead Indian Reservations, which include portions of Flathead, Lake, Glacier, and Pondera Counties in northwest Montana. Twenty house and senate districts are included within this four county area. Petitioners contended that the state's 1993 legislative redistricting plan diluted Indian voting strength and was adopted with a discriminatory purpose in violation of Section 2 of the Voting Rights Act. A new legislative redistricting plan was adopted in 2003 based upon the 2000 census, which complies with Section 2 and renders this case moot.

Legislative redistricting in Montana is performed by a Districting and Apportionment Commission, whose members are appointed by the legislature every decade after release of the decennial census. The legislature has no power over the redistricting process, other than making recommendations. Upon the filing of a redistricting plan by the commission with the secretary of state, the plan becomes law and the commission is dissolved. Constitution of Montana, Article V, Section 14.

A. Proceedings Below

Following an initial trial in 1998, the district court dismissed the petitioners' complaint on the grounds that the redistricting plan did not dilute Indian voting strength and was not adopted with a discriminatory purpose. Petitioners appealed both of these findings.[1] The court of appeals vacated and remanded in *Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2000) ("*Old Person I*"); App. 57a. It affirmed the trial court's finding of no discriminatory purpose but held that petitioners established the three primary factors identified in *Thornburg v. Gingles*, 478 U.S. 30, 50-1 (1986), as probative of vote dilution under Section 2, *i.e.*, geographic compactness, political cohesion, and legally significant white bloc voting. *Old Person I*, 230 F.3d at 1121, 1127; App. 65a-67a, 76a-78a. The court also found that petitioners had established the existence of additional factors probative of vote dilution identified in the Senate report that accompanied the 1982 amendment of Section 2 as follows:

> There was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.

Id. at 1129; App. 80a-81a. The court further found that "in at least two recent elections in Lake County . . . there had been overt or subtle racial appeals,"[2] and that the trial court's finding of "proportionality . . . was erroneous." *Id.* The court directed the trial court on remand to reconsider its ruling in light of its "clearly erroneous finding that white

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1. Other plaintiffs in the litigation also challenged redistricting as it affected the Fort Peck, Fort Belknap, and Rocky Boy Reservations in the northeast part of the state. They did not appeal from the decision of the district court and their claims are not involved in this litigation.

2. Other Senate factors are the use of enhancing devices, the existence of a candidate slating process, and minority office holding. Two additional, subsidiary factors are a significant lack of responsiveness and tenuousness state policy. *Gingles*, 478 U.S. at 36-7.

bloc voting was not legally significant," and its erroneous finding of "proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana." *Id.* at 1131; App. 84a-85a.

The evidence of purposeful discrimination included numerous statements by members of the commission made during executive sessions (which were taped) that can only be described as overtly racial and that showed an intent to limit Indian political participation. Commission members ridiculed the redistricting proposals submitted by tribal members as "idiotic" and "a bunch of crap." App. 133a. They called the tribes' demographer, whom they had never met, a "jackass," "some turkey from God-Knows-Where," a "dingaling," and an "S.O.B." App. 131a, 133a. One commissioner said that if "that bugger" shows up at a meeting "I'll toss him in the trees someplace." App. 131a. When a staff member mistakenly gave some of the commissioners blank pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, "I got a blank one too . . . . [t]his is typical of them Indians." App. 131a. In response to requests from tribal members that any districting plan provide equal electoral opportunities to Indian voters, commission members suggested that all the Indians in the state be packed in one district. According to one commissioner, "give them one District and we go from there." App. 132a. The Indians, according to a commission member, didn't know what was going on: "you get somebody that's getting in there and stirring them up, yeah, they'll get to thinking hell's an icebox." Pl. Exh. 45, pp. 3-4. Another commissioner declared that "[i]f the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it." Pl. Exh. 43, p. 12. When the commission felt obligated to draw a majority Indian district, one commissioner lamented that "[w]e're being had here, ladies and gentlemen." Pl. Exh. 49, p. 2. Another commissioner added, "[a]nd we can't do anything about it." *Id.* Placing white residents in a majority Indian district would, according to one commissioner, "emasculate" white voters. App. 133a. In dismissing the purpose claim, the

district court held that the record did "not contain persuasive evidence of racial animus towards American Indians." App. 139a.

On remand, the district court conducted a second trial limited to evidence since the first trial and issued an order on January 24, 2002, once again dismissing petitioners' complaint. In direct contradiction of *Old Person I*, it held that "the proportionality factor is satisfied," and that Indians were proportionately represented. *Old Person v. Brown*, 182 F.Supp.2d 1002, 1012 (D.Mont. 2002) ("*Old Person II*"); App. 41a.

The court of appeals affirmed. *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002) ("*Old Person III*"); App. 1a. It held that Old Person I "is the law of the case," and affirmed all the court's prior findings showing vote dilution. *Old Person III*, 312 F.3d at 1039; App. 5a. In addition, and setting aside the finding of the district court once again, the panel held that Indians' share of majority-minority districts "is not proportional under either a four-county or a statewide frame of reference, [and that] the proportionality factor weighs in favor of a finding of vote dilution." *Id.* at 1046; App. 17a. But despite proof of the *Gingles* and other factors showing vote dilution, including the lack of proportionality, the panel concluded that Indian voting strength was not diluted because of "the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and official responsiveness to Native American needs." *Id.* at 1050; App. 23a. The panel ignored the evidence presented by petitioners of the resolution of the 2000 Districting and Apportionment Commission, and statements of its individual members, that the 1993 plan diluted Indian voting strength.

B. The 2000 Redistricting Plan

A new districting commission was appointed after release of the 2000 census. On May 4, 2001, it adopted a resolution that:

> recognizes that the 2000 Census data and the evidence of racial bloc voting and other factors regarding the dilution of Indian voting strength identified by the courts in *Old Person* support the creation of an additional majority Indian House District and an additional majority Indian Senate District in the region of Montana that is dealt with in *Old Person*, in recognition of the rights of Indians on the Blackfeet and Flathead Reservations under Section 2 of the Federal Voting Rights Act of 1965.

Def. Ex. 511-R. The Commission, moreover, resolved to create such districts:

> so that the political processes leading to nomination or election to the Montana Legislature are equally open to participation by Indians and so that Indians have an equal opportunity with other members of the electorate to participate in the political process and to elect legislators of their choice for the 2004 and subsequent legislative elections.

Id.

Joe Lamson, a member of the commission, stated at the April 18, 2001, meeting of the commission that the 1993 plan "did result in voter dilution of our Native American population in Montana." Pl. Ex. 3A; Pl. Ex. 3, p. 20. Sheila Rice, another commission member, said that "I actually sat on that House Committee that reviewed this exact plan that was taken to Court . . and argued pretty strenuously that we were diluting the Native American population." *Id.* at p. 28. At the same meeting, Attorney General Mike McGrath acknowledged that the 1993 redistricting plan violated Section 2. "I think ultimately that we will not prevail in this litigation," he said, "that the Plaintiffs will indeed prevail." *Id.* at p. 9.

The commission submitted a redistricting plan to the legislature for recommendations on January 6, 2003. The plan provided for 100 house districts, six of which were majority Indian, and 50 senate districts, three of which were

majority Indian. A new majority Indian house district (HD 1) was created that included parts of the Flathead and Blackfeet Indian Reservations. HD 1, when combined with the preexisting majority Indian house district on the Blackfeet Reservation (HD 85), created a new majority Indian senate district (SD 1). *Old Person v. Brown*, Response to Appellants' Petition for Rehearing and Rehearing En Banc, Exhibit (Adopted House and Senate District, December 2002). The districts for the house contained a total deviation of 9.85%. Joint Legislative Committee on Districting and Apportionment, *Minority Report on SR 2 and HR 3 Regarding the Recommendation to the Montana Districting and Apportionment Commission* 2 (January 29, 2003) (hereinafter "*Minority Report on SR 2 and HR 3*").

Both the house and senate condemned the proposed plan and demanded that the commission adopt a new plan. The house, in a resolution passed on February 4, 2003, charged that "the 5% population deviation allowance contained in the plan was used for partisan gain," that the plan was "mean-spirited," "unacceptable," and that "the legislative redistricting plan must be redone." House Resolution No. 3, February 4, 2003. It also condemned the creation of majority Indian districts. The senate leveled virtually identical charges, and concluded that "the legislative redistricting plan must be redone." Senate Resolution No. 2, February 4, 2003.

The legislature enacted, and the governor signed into law on February 4, 2003, HB 309 which by its terms sought to invalidate the commission's plan and alter or amend the provisions of the state constitution. While Article V, § 14(1) of the state constitution provides that "[a]ll districts shall be as nearly equal in population as is practicable," HB 309 provided that the districts must be "within a plus or minus 1% relative deviation from the ideal population of a district." HB 309 further provided that "[t]he secretary of state may not accept any plan that does not comply with the [1% deviation] criteria."

On February 5, 2003, the commission met to consider the recommendations of the legislature, adopted a plan for

legislative redistricting, and filed the plan with the secretary of state. The secretary of state, however, refused to accept the plan. On the same day, represented by private counsel, he filed a complaint against the commission for declaratory judgment that the commissions's plan was unconstitutional and unenforceable for failure to comply with the population equality standard of HB 309. *Brown v. Montana Districting and Reapportionment Commission*, No. ADV-2003-72 (Mont. 1st Jud. Dist. Ct. Lewis & Clark County). Following a hearing, the state court ruled on July 2, 2003, that HB 309 was unconstitutional and that the secretary of state was required to accept the commission's plan. The secretary of state did not appeal but accepted the commission's plan for filing. It has now become the state's redistricting plan, superceding the 1993 plan challenged in this litigation.

REASONS FOR GRANTING THE PETITION

Petitioners believe that this case has become moot in light of the intervening adoption of a new redistricting plan by the state districting commission, and that the proper procedure pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is to reverse or vacate the judgment below and remand with a direction to dismiss the decisions of the lower courts. In the alternative, if the Court believes the case is not moot, petitioners submit that the petition should be granted because of the failure of the court of appeals to follow the decisions of this Court and those of other courts applying the vote dilution and discriminatory purpose standards of Section 2 of the Voting Rights Act.

I. This Case Has Become Moot

In light of the enactment of a new redistricting plan by the districting commission based on the 2000 census, this litigation has become moot. The 1993 redistricting plan challenged in this litigation has been superceded and is no longer in force or effect. Respondents, it should be noted, agree with this assessment. They argued at length in their brief opposing *en banc* review, and even prior to the final decision of the state court, that this case "has become moot"

and that there is "no longer . . . a live controversy over the 1990 plan." Brief of Appellees, pp. 5, 15.

Under Article III of the Constitution, federal courts may adjudicate only "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). The controversy, moreover, must be "extant" at all stages of review, and not merely at the time the complaint is filed. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1977). A controversy ceases to be extant, or becomes moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm. v. Geraghty*, 445 U.S. 388, 396 (1980).

In the event a case becomes moot on appeal, the procedure to be followed is set out in *Munsingwear*, in which the Court held:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39. As the Court explained, such a procedure

> eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 40. The Court has consistently applied the *Munsingwear* doctrine of vacating decisions where review is prevented through happenstance to prevent the unreviewed decision from having any precedential effect. *Karcher v. May*, 484 U.S. 72, 83 (1987). *Accord*, *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) ("[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment"); *Board of*

Governors of the Federal Reserve System v. Security Bancorp, 454 U.S. 1118 (1981); *Allen v. Ellisor*, 454 U.S. 807 (1981).

Whether or not the 1993 plan violates Section 2 no longer constitutes an actual, ongoing case or controversy. *Lewis v. Continental Bank Corp.*, 494 U.S. at 477. Accordingly, the Court should vacate the judgment of the court of appeals and remand with directions to dismiss the prior opinions that have been entered in the case.[3]

II. The Court of Appeals' "Point Counting" Approach Was Error

The opinion of the court of appeals is in any event fundamentally inconsistent with *Thornburg v. Gingles*, the decisions of other courts of appeals on the relevance of proof of the *Gingles* and Senate factors, and the legislative history of the 1982 amendment of Section 2. The panel, treating them as if they were of equal importance, listed "[o]n one side of the scale" the various factors probative of minority vote dilution identified in *Gingles* and the Senate report, and listed "[o]n the other side of the scale" those that in its view did not show dilution. It then deferred to the balance struck by the district court as not being "clearly erroneous." *Old*

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3. In the court of appeals, and prior to the decision of the state court, petitioners argued that the case might not be moot because plaintiffs would arguably be entitled to special elections this year under a remedial plan in the event the court found that the 1993 plan violated Section 2. Petitioners acknowledge, however, that given the passage of time and the pendency of the 2004 elections they could not establish entitlement to special elections in 2003. As a practical matter, there is no longer enough time to hold them. Petitioners also argued that the case might not be moot because they were entitled to a declaratory judgment that the 1993 plan violated Section 2. Given the fact that the 2003 plan has now been adopted, that it provides petitioners all the relief they sought in their lawsuit and complies with Section 2, and that there are no pending challenges to the plan, a declaratory judgment would be academic or speculative and beyond the power of the Court to grant. *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

Person III, 312 F.3d at 1050; App. 23a.[4] In doing so, the panel resorted to the kind of "point counting" expressly rejected by Congress. The Senate report makes clear that courts should not use the Senate factors "as a mechanical 'point counting' device," and that "[t]he failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution." S.Rep. No. 94-417, 97th Cong., 2d Sess. 29 n.118 (1982), U.S. Code Cong. & Admin. News 1982, p. 207 n.118.

More fundamentally, the panel ignored the holding in *Gingles* that some of the dilution factors have greater "primacy" than others. 478 U.S. at 48 n.15. In *Gingles*, the Court held that in challenges to legislative redistricting the "conjunction" of three factors was most probative of whether the plan impeded "the ability of minority voters to elect representatives of their choice," *i.e.*, geographic compactness of the minority group, minority political cohesion, and legally significant white bloc voting. 478 U.S. at 48.[5]

The Court further identified "the most important" Senate factors in determining a Section 2 violation as the "extent to which voting in the elections of the state or political subdivision is racially polarized," and the "extent to which the minority group members have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 48 n.15. Noting the "primacy of the history and extent of minority electoral success and of racial bloc voting," the Court further held that "[i]f present, the other [Senate] factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance [dilution] . . . are supportive of, but *not essential to*, a minority voter's claim." *Id.* (emphasis in original). The panel, by treating the various Senate factors as

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4. Where, as here, a decision is infected with errors of law, no such deference is due. *Gingles*, 478 U.S. at 79.

5. The *Gingles* analysis applies to challenges to single member district plans. *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

being of equal weight, failed to follow the analysis required by *Gingles*.

The panel's "point counting" approach both devalued the importance of the primary factors showing dilution and inflated the value of those that are the least important. The panel, for example, counted "officials' responsiveness to Native American's needs" as being equal in weight on its "scale" as "racially polarized elections" and "disproportionality." *Old Person III*, 312 F.2d at 1050; App. 23a. The Senate report, however, provides that "[u]nresponsivess is not an essential part of plaintiff's case," and that "proof of some responsiveness would not negate" a Section 2 challenge. U.S. Code Cong. & Admin. News 1982, p. 207 n. 116. The House report is similarly clear that Section 2 "avoids highly subjective factors such [as] responsiveness.' H.Rep. No. 227, 97th Cong., 1st Sess. 30 (1981).

Indeed, the court in *Old Person I*, 230 F.3d at 1129 n.14; App. 81a, indicated that evidence of responsiveness was of "limited relevance." The decisions of other courts of appeals are to the same effect. *See McMillan v. Escambia County, Fla.*, 638 F.2d 1239, 1249 (5th Cir. 1981) ("[w]hether current office holders are responsive to black needs is simply irrelevant to that [§ 2] inquiry; a slave with a benevolent master is nonetheless a slave"); *United States v. Marengo County Comm'n.*, 731 F.2d 1546, 1572 (11th Cir. 1984) ("although a showing of unresponsiveness might have some probative value a showing of responsiveness would have very little"). The panel opinion, by elevating responsiveness to equal importance with legally significant racial bloc voting and proportionality, conflicts with *Gingles*, the legislative history, the law of the case in *Old Person I*, and opinions of other courts of appeals.

The panel also improperly inflated the importance of an alleged "viable policy" underlying the existing plan. *Old Person III*, 312 F.2d at 1050; App. 23a. The Senate report provides that whether the policy underlying a challenged practice is "tenuous" may have probative value "in some cases." U.S. Code Cong. & Admin. News 1982, p. 207.

However, the report further provides that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." *Id.* at n.117. Other courts of appeals have acknowledged that the tenuousness of state policy is of secondary importance under Section 2. *See, e.g., United States v. Marengo County Comm'n*, 731 F.2d at 1567 ("[s]tate policy is less important under the results test"); *LULAC v. Clements*, 986 F.2d 728, 753 (5th Cir. 1993) (same). The panel erred in elevating a "viable policy" to the same level of importance as racial bloc voting and proportionality, and in using it to negate the most important factors showing minority vote dilution.

While proof of the three *Gingles* factors is not conclusive, the Court held in *Johnson v. DeGrandy*, 512 U.S. 997, 1012 (1994), that "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors." Numerous courts of appeals have acknowledged the primacy and importance of proof of the *Gingles* factors. In *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995), the court concluded that Section 2 "allows plaintiffs to establish a prima facie case of vote dilution by proving the three *Gingles*" factors. In *Harvell v. Blytheville School District. # 5*, 71 F.3d 1382, 1390 (8th Cir. 1995), the court held that "[s]atisfaction of the necessary *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation." *Accord, Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1116 n.6 (3rd Cir. 1993) (it would be a "rare case" in which a plaintiff successfully proved the existence of the three *Gingles* factors and still failed to establish a Section 2 violation); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1322 (10th Cir. 1996) (same); *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1390 (5th Cir. 1996) (same). If a trial court finds for a defendant despite the existence of the *Gingles* and other senate factors, it should be required to explain how the less important and vague elements of its analysis override those factors. Its failure to do so renders the clearly erroneous standard of appellate review meaningless.

Here, the panel failed to accord the *Gingles* and primary Senate factors the weight to which they were entitled and improperly concluded that they were trumped by factors of lesser or insignificant importance, such as responsiveness and viable state policy. The petition for a writ of certiorari should be granted because the panel opinion conflicts with opinions of the Supreme Court and other courts of appeals, and because of the overriding need for national uniformity in the application of Section 2.[6]

III. The Panel Placed Improper Reliance on the Election of an Indian Candidate

In concluding that Indians enjoyed proportional representation, the panel gave inordinate weight to the election of Joey Jayne, an Indian, in HD 73 in the 2000 election, noting that "the district court stressed evidence concerning the election of Joey Jayne." *Old Person III*, 312 F.2d at 1048; App. 20a. With the sole exception of Jayne's election from HD 73, the success of Indian candidates in the twenty district (13 house, 7 senate) area has been limited entirely to one majority Indian district (HD 85).

Indians currently represent only two (10%) of the 20 house and senate districts in the four county area. Based on total population, the Indian representation is only 66.7% proportional (10% ÷ 15% = 66.66%). Based on the "relevant population" used by the panel, the Indian representation is only 74.13% proportional (10% ÷ 13.49% = 74.13%). These figures do not permit a finding of proportional representation. It was simply illogical, and legal error, for the panel to conclude, where Indians do not in fact enjoy proportional representation, that "the factor of success in elections favored defendants." *Old Person III*, 312 F.3d at 1048; App. 20a. Under the panel's analysis, *any* Indian

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6. The panel complained that it was "quite difficult" to assess the impact of a practice alleged to dilute minority voting strength, *Old Person III*, 312 F.2d at 1049 n.14; App. 22a, but that is because it failed to follow the analysis provided in *Gingles*, which places primary reliance on verifiable and objective census and election data to determine the central issues of compactness, cohesion and polarized voting.

success would establish proportional representation and defeat a Section 2 challenge.[7]

Further, in refusing to consider Jayne's election as a "special circumstance," the panel opinion conflicts with *Gingles* and *Ruiz v. City of Santa Maria*, 160 F.3d 543 (9th Cir. 1998). According to the panel, "a theory that Jayne's election should be disregarded as 'special circumstances' is speculative and we cannot substitute our views for those of the district court." *Old Person III*, 312 F.2d at 1048 n.13; App. 20a. Terming this evidence "speculative" flies in the face of this Court, which cited the election of a minority in "the absence of an opponent" as a special circumstance which would not defeat a Section 2 claim. *Gingles*, 478 U.S. at 57. Here, Jayne had no opponent in the Democratic primary and no major party opposition in the general election. Pl. Ex. 8, p. 3; Pl. Ex. 9, p. 5. Such a special circumstance does not negate a finding of vote dilution.

Moreover, Jayne's opponent in the general election, Jore, ran as a Constitution Party candidate. The Constitution Party is an extremist party with an isolationist, anti-Indian platform. It favors repeal of the Voting Rights Act, the Federal Reserve Act, and the National Security Act; withdrawal from NATO, the UN, the IMF, and the World Bank; termination of foreign aid; and abolishing the Department of Education and the IRS. Constitution Party candidates made uniformly poor showings in the legislative contests in which they offered, except in HD 73 where Jore got 62% of the white vote, 49% of the total vote, and came within 54 votes of being elected. Pl. Ex. 10; ER, Pl. Ex. 2,

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7. The panel also said that in finding electoral success the "district court considered only Indian candidates and not Indian preferred candidates who were not Indian." *Old Person III*, 312 F.3d at 1047 n.12; App. 18a. To the contrary, the district court erroneously included a non-Indian (Roush from SD 43) in its equation. *Old Person II*, 182 F.Supp.2d at 1016; App. 48a. As important, Roush was *not* the candidate of choice of Indian voters. Pl. Ex. 2, p. 18, Table 1; p. 21, Table 4. The panel's deference to the district court's finding of proportional representation, which was in part erroneously based on Roush's election, was misplaced.

pp. 18, 20.[8] There is nothing "speculative" about the special circumstances surrounding Jayne's election, nor does it stand for the proposition that race is not a factor in elections nor that Indians can usually elect candidates of their choice. To the contrary, the unusual support for an extremist party candidate in HD 73 is a dramatic example of the "targeting" of a minority candidate by white voters. *See Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994).

The Senate report provides that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." U.S. Code Cong. & Admin. News 1982, p. 207 n. 115 (citation omitted). Similarly , in *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), the three-judge court discounted black electoral success in elections following the filing of the complaint. The court concluded that:

> the success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunity to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state--either generally or specifically in the areas of the challenged districts.

590 F. Supp. at 367. In affirming, the Court held that where a challenged plan "generally works to dilute the minority vote, it cannot be defeated on the ground that it sporadically and serendipitously benefits minority voters." *Gingles*, 478 U.S. at 76.

In *Ruiz*, 160 F.3d at 558, the court held that where plaintiffs showed that "unusual circumstances" surrounded

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8. Where they faced candidates from both major parties, the best any Constitution Party candidate did was to get 9% of the vote. *Id.*

the election of a minority candidate, a district court "must discount the election results" in its *Gingles* analysis. The panel opinion conflicts with *Ruiz* and opinions of other courts of appeals holding that the election of a minority, particularly after litigation has begun, does not weigh heavily in the dilution equation. *See NAACP v. Gadsden County School Bd.*, 691 F.2d 978, 983 (5th Cir. 1982); *United States v. Marengo County Comm'n.*, 731 F.2d at 1572.

The panel's proportional representation holding is also in direct conflict with its finding that plaintiffs established the third *Gingles* factor. By concluding that Indians had an equal chance to elect candidates of their choice, the panel necessarily disregarded and contradicted its conclusion that whites voted as a bloc usually to defeat the candidates preferred by Indian voters.

The success that has been achieved by one Indian candidate in one majority white district is not only a special circumstance, but is too minimal and too recent in relation to the long history of denial of equal electoral opportunities to support the panel's conclusion that Indian voting strength is no longer diluted. The petition for a writ of certiorari should be granted because the panel opinion conflicts with opinions of this Court and other courts of appeals, and because of the overriding need for national uniformity in the application of Section 2.

IV. The Panel Ignored "Powerful" Evidence of Vote Dilution

The court of appeals completely ignored the conclusion of the Districting and Apportionment Commission that the 1993 plan diluted Indian voting strength. It also ignored the statements of commission members that the challenged plan diluted Indian voting strength, as well as the concessions of the attorney general that the state would lose the *Old Person* litigation.

Under Section 2 a court has a duty to make "a searching practical evaluation of the past and present reality" and take "a functional view of the political process." *Gingles*, 478

U.S. at 45. The panel could not discharge that duty by ignoring the findings of the commission, which is the very entity charged under state law with resolving issues of minority vote dilution and conducting legislative redistricting. In addition, the members of the commission and the attorney general were veterans of the political, legislative, and redistricting processes. They were in a unique position to provide the court with "a searching practical evaluation of the past and present reality" and "a functional view of the political process." It is indefensible that the panel ignored the statements of these public officials that Indian voting strength was diluted under the 1993 plan.

In *Miller v. Johnson*, 515 U.S. 900 (1995), in invalidating Georgia's congressional redistricting, the Court placed special reliance on public statements by the state's attorney general that the plan violated traditional redistricting principles. According to the Court, "[t]his statement from a state official is powerful evidence that the legislature subordinated traditional districting principles" in enacting the challenged plan. *Id.* at 919. The statements of General McGrath and members of the commission, as well as the formal findings of the commission, are also powerful evidence that the panel should have considered that the 1993 plan diluted Indian voting strength. As the court held in *Old Person I*, 230 F.3d at 1120; App. 64a-65a, a court "must" consider evidence relating to the totality of circumstances. The panel's failure to do so conflicts with decisions of this Court and those of courts of appeals and completely undermines the reliability of its decision.

V. The Lower Court's Racial Purpose Analysis Was Flawed

While petitioners are not required to prove a discriminatory purpose, *Gingles*, 478 U.S. at 35, both the Senate and House reports provide that proof of a discriminatory purpose would also constitute a violation of Section 2. S.Rep. No. 417 at 27; H.R. Rep. No. 277, 97th Cong., 1st Sess. 30, n.101 (1981). The Senate report incorporates the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252,

264-68 (1977), for proof of a discriminatory purpose under Section 2. S. Rep. No. 417 at 27 n. 108. Aside from direct "smoking gun" evidence, factors probative of a discriminatory intent under *Arlington Heights*, 429 U.S. at 264-68, include: (1) whether the impact of the official action bears more heavily on one group than another; (2) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (3) the sequence of events leading up to the challenged decision; (4) any departures from the normal procedural sequence; (5) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and, (6) the legislative or administrative history, including contemporaneous statements by members of the decisionmaking body.

Here, the direct and circumstantial evidence of purposeful discrimination is overwhelming. The impact of the 1993 redistricting plan bears more heavily on Indians than non-Indians, an impact that was readily foreseeable. The historical background reveals that Indians were discriminated against in voting and other areas of life, and that in prior redistricting concentrations of Indian population were fragmented and the reservations divided into numerous house and senate districts. The contemporaneous record of the commission's proceedings reveals a series of official actions taken for invidious purposes. The commission refused to apply, or selectively applied, their mandatory and discretionary criteria when it came to Indians. The record is replete with statements by members of the commission indicating their disdain for Indians and civil rights, and their desire to contain Indian political participation to the greatest extent they thought possible.

Hunter v. Underwood, 471 U.S. 222, 228 (1985), provides that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Accord*, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). For burden shifting to apply, a

plaintiff is not required to prove that a discriminatory purpose was the "dominant" or "primary" purpose for the challenged practice or procedure, but only that it has been "a motivating factor" in the decisionmaking process. *Hunter v. Underwood*, 471 U.S. at 228. As the Court explained in *Arlington Heights*, 429 U.S. at 265:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. . . . But racial discrimination is not just another competing consideration. Where there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

The district court failed to apply the burden shifting analysis of *Hunter v. Underwood* and *Mt. Healthy* because it found no evidence of "racial animus." App. 139a. "Animus" means "a feeling of strong ill will or hatred." *Webster's New World Dictionary, Second College Edition* (1970). Intentional racial discrimination may often include an element of ill will or hatred, but it is not one of its essential elements. In *Miller v. Johnson* there was no contention that those who drew the challenged redistricting plan acted out of racial ill will or hatred. Indeed, the state's reason for adopting its plan was the non-racist one of complying with an objection by the Department of Justice under Section 5 of the Voting Rights Act. 515 U.S. at 921. Despite the absence of any racial animus, the Court found the state's plan was purposefully discriminatory in violation of the Fourteenth Amendment.

Whether or not the commissioners were biased against Indians, and there is abundant evidence that they were, they engaged in purposeful discrimination because they intentionally chose to dilute Indian voting strength in the Blackfeet-Flathead area. The district court thus erred in applying an incorrect legal standard of "animus" in its intent analysis, improperly discounted the substantial evidence that discrimination was a motivating factor in the commission's

decisionmaking process, and failed to apply the required burden shifting analysis. No matter what the standard of proof, the 1993 redistricting plan violates the purpose prong of Section 2.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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